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RE KAI PENG BHD

HIGH COURT MALAYA, KUALA LUMPUR

RAMLY ALI J

[ORIGINATING SUMMONS NO: D5-24-11-2007]

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16 MAY 2007

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COMPANY LAW: *Arrangements and constructions - Restraining order - Extension of, application for - Whether ought to be granted - Companies Act 1965, s. 176(10A) - Whether requirements met - Whether there were 'good reasons' to allow such an extension - Whether application allowed*

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The applicant had earlier applied by way of an *ex parte* originating summon (encl. 1) filed pursuant to s. 176(1) and (10) of the Companies Act 1965 ('the Act') for, *inter alia*, (a) that the applicant be given leave to convene separate meetings to be held in respect of separate classes of creditors described as the secured creditors and unsecured creditors for the purpose of considering and approving the scheme of arrangement proposed to be made between the applicant and its creditors and (b) a restraining order

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be granted preventing any action or proceedings against the applicant including but not limited to winding up execution and arbitration proceedings. The court had allowed the restraining order pending the hearing of the remaining prayer (a) of the application as the relevant approvals from the regulatory authorities

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had not been obtained. The initial period of 90 days ended on 24 April 2007. The applicant now filed on application by way of a summon in chambers (*vide* encl. 8) to extend the said restraining order for a further period of 90 days. The said application came up for hearing on 19 April 2007 where it was ordered that the

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opposing creditors, namely GEA Power Cooling System Inc (GEA) and Maybank (MBB) be formally made parties to the proceedings. The opposing creditors opposed the application on the following grounds: (1) the applicant had failed to comply with the mandatory statutory prerequisites necessary for the granting of an

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extension of a restraining order pursuant to s. 176 (10A) of the Companies Act 1965; (2) the scheme as envisaged was vague and uncertain and failed to show any credible or *bona fide* proposal or scheme of arrangement; (3) the applicant had failed to provide an accurate and complete statement of affairs of the company made up to a date not more than three days before the application was

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lodged; (4) an extension of the restraining order as applied by the

applicant was really necessary to enable the applicant and its creditors to formalize the scheme for approval of the creditors; (5) the applicant had failed to show that there was a director nominated by the majority of the creditors, the approval of whom the court should approve under s. 176(10A)(d) of the Companies Act 1965; (6) that there would be no possibility of the statutory required percentage being obtained favouring the scheme.

Held (allowing applicant's application):

- (1) The opposing creditors' view that s. 176(10A)(a) of the Act requires the applicant to show proof that more than 50% of its creditors have approved the proposed scheme of arrangement was an erroneous construction of the said subsection. Approval of the creditors was only relevant at the stage of the creditors meeting ordered by the court under s. 176(3) of the Act, but not at the stage of asking for an extension of the restraining order under s. 176(10A). A proper construction of s. 176(10A)(a) of the Act would show that all the applicant needed to show was that the scheme as proposed involved more than 50% of its creditors. Here, the proposed scheme was applicable and covered all its creditors subsidiaries as well as non-subsidiaries. There would be no creditors left out of the proposed scheme. All would be involved. As long as 50% of its creditors could avail themselves of the proposed scheme, the statutory requirement under s. 176(10A)(a) of the Act would be fulfilled. (paras 16 & 18)
- (2) The details of the proposed scheme clearly showed that the creditors would benefit. The said scheme was a feasible scheme and highly unlikely to fail if approval was obtained from the Securities Commission as the creditors would be able to get paid more compared to if the applicant company was being wound up. If the applicant company was being wound up, the unsecured creditors of the applicant company would only be paid a very minimal amount. It would be erroneous for the opposing creditors to state that the scheme was vague, uncertain and failed to show any credible or *bona fide* proposal or scheme of arrangement. (para 19)
- (3) The applicant had filed the statement of affairs in prescribed form disclosing the statement of assets and liabilities of the applicant one day prior to the filing of the application. The prescribed form provided for secured creditors under sch. D

- A of the statement of affairs. Therefore the court was fully satisfied that requirement under s. 176(10A)(c) of the Act had been fulfilled. (para 21)
- B (4) The applicant had a proposed scheme of arrangement which was pending the approval of the Securities Commission and the applicant too had applied for an order of this court for leave to convene creditors' meeting which was yet to be heard pending the approval of the Securities Commission. Under such circumstances, the court was fully satisfied that such an extension of the restraining order as applied by the applicant was really necessary to enable the applicant and its creditors to formalize the scheme for approval of the creditors. This requirement under s. 176 (10A)(b) of the Act was also fulfilled. (para 23)
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- D (5) At the stage of application for extension of the restraining order under s. 176(10A) of the Companies Act 1965, all the creditors could be grouped together for the purpose of appointing a director under s. 176(10A)(d) of the Act. There was no evidence of divergence of interest between the applicant's subsidiaries and the other unsecured creditors. The opposing creditors who opposed the application had failed to adduce such evidence. A substantial part of the unsecured creditors supported the subsidiary creditor's views on the nomination of one Dato Wan Ismail as a director of the applicant. There would therefore be no unfairness in grouping Maju Steel Sdn Bhd with the rest of the creditors to support the said nomination at this stage of the proceeding. (para 29)
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- G (6) The operative words in s. 176(3) of the Act is '... three fourths in value of the creditors or class of creditors.' GEA and MBB (both the opposing creditors) were the only creditors who have indicated opposition to the scheme. Combined, they made only 14.53% of the value of the creditors. The remaining 85.47% of the value of the creditors have yet to decide. Their contention that there would be no possibility of the statutory required percentage being obtained favouring the scheme was therefore baseless. (para 33)
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- I (7) The applicant company in its present application for an extension of the restraining order had met afresh all the requirements found in s. 176(10A) of the Companies Act 1965. There were 'good reasons' to allow such an extension

as applied. The opposing creditors' opposition had failed to cast any doubt to the said 'good reasons.' Therefore the court overruled the opposition and allowed the applicant's application for an extension of the restraining order for the period of ninety (90) days from 25 April 2007. (para 34)

Case(s) referred to:

Metroplex Bhd & Ors v. V Morgan Stanley Emerging Markets Inc & Ors; RHB Sakura Merchant Bankers Bhd & Ors (Intervenes) [2005] 3 CLJ 810 HC (**refd**)

Re Kuala Lumpur Industries Berhad & Ors [1991] 3 CLJ 2867; [1991] 3 CLJ (Rep) 86 HC (**refd**)

Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1990] 1 CLJ 827; [1990] 3 CLJ (Rep) 106 HC (**refd**)

Twenty First Century Oils Sdn Bhd v. Bank of Commerce (M) Bhd & Ors (No 2) [1993] 2 CLJ 677 HC (**refd**)

Legislations referred to:

Companies Act 1965, s. 176(1), (3), (10), (10A)(a), (b), (c), (d)

For the applicant - V Manokaran (PY Chong with him); M/s Nordin Torji & Partners

For the opposing creditor (GEA Power Cooling System) - John Skelchy (SN Raj with him); M/s Zahid Ibrahim

For the opposing creditor (Maybank) - CS Mong

Reported by Suhainah Wahiduddin

JUDGMENT

Ramly Ali J:

[1] Enclosure 8 is the applicant's application seeking for an order that the restraining order dated 24 January 2007 be extended for a further period of 90 days. The said restraining order had expired on 24 April 2007 and it had been extended till 7 May 2007 by way of an ad interim order dated 19 April 2007.

[2] The grounds for an extension of the restraining order are as follows:

- (a) a draft scheme of arrangement had been forwarded to Securities Commission on 14 February 2007 for approval, however as at todate, the applicant is yet to receive the said approval from Securities Commission; and

- A (b) therefore the applicant company is unable to proceed further ie, to convene a creditors meeting in respect of the scheme of arrangement within the initial validity period of the restraining order.
- B [3] Earlier on, *vide* encl. 1, the applicant applied by way of an *ex parte* originating summon filed pursuant to s. 176(1) and (10) of the Companies Act 1965 for *inter alia* orders that:
- C (a) the applicant be given leave to convene separate meetings to be held in respect of separate classes of creditors described as the Secured Creditors and Unsecured Creditors for the purpose of considering and if thought fit, approving with or without modification, the scheme of arrangement proposed to be made between the applicant and its creditors; and
- D (b) a restraining order be granted preventing any action or proceedings against the applicant including but not limited to winding-up execution and arbitration proceedings.
- E [4] The court dealt with prayer (b) on 24 January 2007 and allowed the restraining order for a period of 90 days (from 24 January 2007) pending the hearing of the remaining prayer (a) of the application as the relevant approvals from the regulatory authorities had not been obtained. The initial period of 90 days ended on 24 April 2007. The applicant now file on application by
- F way of a summon in chambers (*vide* encl. 8) to extend the said restraining order for a further period of 90 days. The said application came up for hearing on 19 April 2007 where it was ordered that the Opposing Creditors namely GEA Power Cooling System Inc. and Maybank be formally made parties to the
- G proceedings.

The Proposed Scheme Of Arrangement

- H [5] The Proposed Scheme of Arrangement envisages the followings:
- I (i) The transfer of the listing status of the applicant to a new company (NewCo) by a share-swap exercise full details of which are found in exh. P13;
- (ii) the acquisition of Maju Steel (a wholly owned subsidiary of the applicant) by Newco by issuance of NewCo shares to the applicant for purposes of partial settlement to the unsecured

creditors. Maju Steel is the on-going steel related business in the applicant's group which had advanced a sum of RM28.9 million to the applicant and had assisted the applicant's cash-flow. See exh. P13, para 2 and 3;

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(iii) the injection of fresh funds into the NewCo by way of Special Placement and Rights Issue amounting to RM12.6 million a significant portion of which would be available a working capital for the NewCo; and

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(iv) all other remaining subsidiaries of the applicant including the applicant will eventually be liquidated and the unsecured creditors may still benefit from the realisation of the assets subsequent to the said liquidation.

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[6] As at 30 September 2006, the applicant has liabilities amounting to RM53.0 million, comprising borrowings of RM10.0 million, amount owing to subsidiary companies of RM29.1 million, and trade and other payables of RM13.0 million, including RM10.8 million owing to GEA Power Cooling System Inc. In addition there are amounts owing by the applicant arising from corporate guarantee granted by the applicant to certain lenders of its subsidiary companies, amounting to RM49.7 million.

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[7] The amount owed by the applicant to the opposing creditors, namely GEA Power Cooling System Inc. is RM10.8 million and Maybank is RM719,369.

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Grounds For Opposing The Application

[8] The opposing creditors oppose the application on the following grounds:

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(a) the applicant has failed to comply with the mandatory statutory prerequisites necessary for the granting of an extension of a restraining order pursuant to s. 176(10A) of the Companies Act 1965;

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(b) there is no useful purpose of sanctioning a creditors meeting under s. 176(1) as the applicant has failed to show that the scheme would obtain the approval of the statutory majority required;

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(c) the scheme as presently envisaged is vague and uncertain and fails to show any credible or *bona fide* proposal or scheme of arrangement;

- A (d) the scheme (which does not even have the requisite regulatory approvals) and this application are merely devices to avoid making valid payments; and
- (e) the scheme would be contrary to public policy.

B **Applicable Law**

[9] The applicable law relating to an application for an extension of the restraining order is provided under s. 176(10A) of the Companies Act 1965 which reads as follows:

- C (10A) The Court may grant a Restraining Order under sub-section (10) to a company for a period of not more than ninety (90) days or such longer period as the Court may for good reason allow if and only if:
- D (a) it is satisfied that there is a proposal for a scheme of compromise or arrangement between the company and its creditors or any class of creditors representing at least one-half in value of all the creditors;
- E (b) the restraining order is necessary to enable the company and its creditors to formalise the scheme of compromise or arrangement for the approval of the creditors or members pursuant to sub-section (1);
- F (c) a statement in the prescribed form as to the affairs of the company made up to a date not more than three (3) days before the application is lodged together with the application; and
- G (d) it approves the person nominated by a majority of the creditors in the application by the company under sub-section (10) to act as a director or if that person is not already a director, notwithstanding the provisions of this Act or the memorandum and articles of the company, appoints the person to act as a director.

- H [10] The law on extension of restraining order requires all the provisions of s. 176(10) of the Companies Act 1965 to be met afresh in order to empower the court to grant any extension of the restraining order. A restraining order may only be extended for such longer period for “good reasons” and ‘if and only if’ conditions (a) to (d) of s. 176(10A) had been satisfied and that
- I there was reasonable progress towards the achievement of a viable and feasible creditors’ scheme of arrangement, (see: *Metroplex Bhd.*

& Ors v. V. Morgan Stanley Emerging Markets Inc. & Ors; RHB Sakura Merchant Bankers Bhd & Ors (Interveners) [2005] 3 CLJ 810). All conditions (a) to (d) must be satisfied. There must also be 'good reason' for allowing such an extension. A

[11] The words "good reason" have been construed by the courts to mean that: B

(a) a *bona fide* scheme of arrangement has been proposed and presented, with sufficient details provided to the creditors to enable them to make informed decisions as to its feasibility and merits (see: *Re Kuala Lumpur Industries Berhad & Ors* [1991] 3 CLJ 2867; [1991] 3 CLJ (Rep) 86); C

(b) the scheme of arrangement proposed and presented must not be such that it is bound to fail (see: *Twenty First Century Oils Sdn. Bhd. v. Bank of Commerce (M) Bhd. & Ors (No. 2)* [1993] 2 CLJ 677); and D

(c) the interest of creditors, that is, the beneficiaries under the proposed arrangement is safeguarded (see: *Sri Hartamas Development Sdn. Bhd. v. MBf Finance Bhd.* [1990] 1 CLJ 827; [1990] 3 CLJ (Rep) 106). E

[12] In *Re Kuala Lumpur Industries Bhd. & Ors (supra)*, VC George J held that:

In making a section 176(10) order, there must be a proposal of the scheme of compromise or arrangement (not necessarily ready for presenting to the creditors to be voted upon) but with sufficient particulars to enable the Court to assess that it is feasible and merits due consideration by the creditors when it is eventually placed before them in detailed form ... F
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[13] The paramount consideration for the court in a s. 176 application is the safeguarding of the welfare of the creditors. In that respect the question that the court should apply its mind in exercising its discretion is "would the creditors be in a better position by the implementation of the proposed scheme of arrangement as opposed to the company being liquidated." H

[14] The opposing creditors have contended that the applicant has failed to show that there is a valid *bona fide* proposal for a scheme between the company and at least half of its creditors on the grounds that: I

- A (i) while the applicant contends that 2 creditors namely Capital Network Sdn. Bhd. and Maju Alat Ganti Sdn. Bhd. have agreed to the scheme, these creditors merely represent approximately 30.19% of the total creditors; and
- B (ii) further Maju Alat Ganti Sdn. Bhd. is a wholly owned subsidiary of Maju Steel Sdn Bhd which in turn is a wholly owned subsidiary of the applicant and should not be taken to represent the views of the general body of creditors of the application.
- C [15] The opposing creditors are of the view that s. 176(10A)(a) requires the applicant to show proof that more than 50% of its creditors have approved the proposed scheme of arrangement.
- D [16] This is an erroneous construction of the said sub-section. The said sub-section provides for no such requirement. If such approval of the creditors is required (at that stage of the scheme) why then the requirement in s. 176(3) of the Act for the proposed scheme to be approved at the creditors meeting.
- E Approval of the creditors is only relevant at the stage of the creditors meeting ordered by the court under s. 176(3) of the Act, but not at the stage of asking for an extension of the restraining order under s. 176(10A). A proper construction of s. 176(10A)(a) will show that all the applicant needs to show is that the scheme as proposed, involves more than 50% of its creditors.
- F [17] The creditors here means “all creditors” of the applicant which include secured and unsecured creditors. All creditors must be taken into consideration irrespective of whether they are subsidiaries or non-subsidaries of the applicant.
- G [18] In the present case, it can be seen that the proposed scheme is applicable and covers all its creditors subsidiaries as well as non-subsidaries. In other words there would be no creditors who would be left out of the proposed scheme. All will be involved. As long as 50% of its creditors can avail themselves of the proposed scheme, the statutory requirement under s. 176(10A)(a) would be fulfilled.
- H [19] The details of the proposed scheme clearly show that the creditors being shareholders of the NewCo under the proposed scheme would benefit from the scheme. The said scheme is a
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feasible scheme and highly unlikely to fail if approval is obtained from the Securities Commission as the creditors will be able to get paid more compared to if the applicant company is being wound up. If the applicant company is being wound up, the unsecured creditors of the applicant company will only be paid a very minimal amount ie, about 0.03% or even nil. It would be erroneous for the opposing creditors to state that the scheme is vague, uncertain and fails to show any credible or *bona fide* proposal or scheme of arrangement.

[20] The opposing creditors have also contended that the applicant has failed to provide an accurate and complete statement of affairs of the company made up to a date not more than three (3) days before the application is lodged. In this regard the opposing creditors argued that while the applicant's financial statements contained in the latest annual report indicate that the applicant has secured creditors, the statement of affairs fails to provide or make reference to the secured creditors.

[21] The court is of the view that this contention by the opposing creditors is clearly baseless and erroneous. In the present case, the applicant on 6 April 2007 filed the statement of affairs in prescribed form disclosing the statement of Assets and Liabilities of the applicant as at 5 April 2007 which is one (1) day prior to the filing of the application. The prescribed form provides for Secured Creditors under Schedule D of the Statement of Affairs (see: Lampiran 9, exh. P23). Therefore, the court is fully satisfied that requirement under s. 176(10A)(c) has been fulfilled.

[22] The proposed scheme involves all the creditors of the applicant. It has to be first approved by the relevant authorities including the Securities Commission, before being tabled at the creditors meeting. Prayer (1) of the applicant's originating summon prays for leave to convene separate meetings to be held in respect of separate classes of creditors for the purpose of considering and if thought fit, approving the said scheme of arrangement. That application is still pending in this court in view of the fact that the Securities Commission has yet to give its approval on the proposed scheme. There was a reasonable progress towards their achievement. The applicant through its agent, MIDF Amanah Investment Bank Bhd. had on 14 February 2007 submitted the proposed scheme to the Securities Commission. On 7 March 2007, the Securities Commission requested for certain information to be provided in relation to the scheme. The information was

- A submitted on 15 March 2007. On 29 March 2007, the Equity Compliance Unit of the Securities Commission requested for some information. The information was submitted on 10 May 2007. On 3 May 2007 the Securities Commission again requested for certain information and clarification in relation to the scheme. The
- B applicant and its advisers are currently in the midst of compiling all the necessary information for submission to the Securities Commission.

- C [23] To date, the Securities Commission has not rejected the scheme outright. The applicant here has a proposed scheme of arrangement which is pending the approval of the Securities Commission and the applicant too had applied for an order of this court for leave to convene creditors meeting which is yet to be heard pending the approval of the Securities Commission. Under
- D such circumstances, the court is fully satisfied that such an extension of the restraining order as applied by the applicant is really necessary to enable the applicant and its creditors to formalise the scheme for approval of the creditors. This requirement under s. 176(10A)(b) is also fulfilled.

- E [24] The opposing creditors have also contended that the applicant has failed to show that there is a director nominated by the majority of the creditors, the approval of whom the court should approve under s. 176(10A)(d) of the Companies Act 1965.
- F The opposing creditors further contended that:

- (i) the applicant has failed to show that the candidate was in fact approved by a majority of the applicant's creditors. In this regard, the creditors who nominated the directors (Maju Steel Sdn. Bhd., MDV Berhad and EON Bank) merely represents
- G approximately 32.8% of the total creditors;
- (ii) the actual percentage of representation of Maju Steel Sdn. Bhd. of the total body of creditors would be further diluted, in the event that the applicant's secured creditors are taken
- H in account; and
- (iii) further Maju Steel Sdn. Bhd. is a wholly owned subsidiary of the applicant and should not be taken to represent the views of the general body of creditors of the application. In this instance the opposing creditors alleged the creditors supporting the appointment of the director merely represents
- I 16.6% of the total creditors.

[25] The court cannot agree with the opposing creditors on this issue. In this case the appointment of the said director, Dato Wan Ismail bin Abdul Rahman is consented to by the following creditors, namely:

- (i) Maju Steel Sdn. Bhd. being 16.22% of the creditors;
- (ii) Maju Alat Ganti Sdn. Bhd. being 22.08% of the creditors;
- (iii) Malaysia Debt Venture being 11.89% of the creditors;
- (iv) EON Bank Berhad being 4.71 % of the creditors; and
- (v) CIMB being 5.1% of the creditors.

[26] The respective percentages above are gathered from the figures available in the statement of affairs taking into account that the total amount of debt owed to all creditors by the applicant is RM79,289,382. As can be seen the value of the creditors making the nomination of Dato Wan Ismail bin Abdul Rahman comes to 59.99% which forms the majority and therefore complying with s. 176(10A)(d).

[27] The opposing creditors further contended that Maju Steel Sdn. Bhd. is a wholly – owned subsidiary of the applicant and therefore, should not be taken to represent the views of the general body of creditors of the applicant.

[28] As can be seen from the facts submitted before the court, 59.9% of the unsecured creditors have shown their support for the nomination of Dato Wan Ismail for appointment as a director of the applicant. Maju Steel Sdn. Bhd. forms only 16.22% out of the 59.9%.

[29] In the present case, the proposed scheme takes care of all the creditors of the applicant, secured as well unsecured irrespective of whether they are subsidiaries of the applicant or not. All the unsecured creditors are to be treated equally if the scheme is approved. At this stage of the proceeding, ie, at the stage of application for extension of the restraining order under s. 176(10A) of the Companies Act 1965, all the creditors can be grouped together for the purpose of appointing a director under s. 176(10A)(d) of the Act. There is no evidence of divergence of interest between the applicant's subsidiaries and the other unsecured creditors. The opposing creditors who oppose the

- A application has failed to adduce such evidence. The subsidiary in the present case (Maju Steel Sdn. Bhd) does not stand to benefit more than the other unsecured creditors. The evidence shows that a substantial part of the unsecured creditors support the subsidiary creditor's views on the nomination of Dato Wan Ismail as a
- B director of the applicant. There would therefore be no unfairness in grouping Maju Steel Sdn. Bhd. with the rest of the creditors to support the said nomination at this stage of the proceeding.

- C [30] In any event the court has the final say to determine if the director nominated should be approved and appointed. The court will look at the credentials and to be satisfied that he has no direct or indirect interest in the applicant or any of the subsidiaries. In this case, the court accept his appointment based on his impeccable credentials which would remove all doubts that
- D he would act in concert with any quarter to the disadvantage over the others. He has no interest directly or indirectly in the applicant and is totally independent and has no conflict of interest in representing the creditors.

- E [31] The opposing creditors also argued that there is no useful purpose of sanctioning a creditors meeting as the scheme is likely to fail for failure to obtain approval of statutory majority required under s. 176(3) of the Companies Act 1965.

- F [32] This argument is without merit, and baseless. The court cannot anticipate what would be the decision or resolution of the creditors meeting which has not been held yet. It is up to all the creditors or classes of creditors to deliberate on the issue at their respective meetings and to resolve the matter. Therefore, that issue would not be a reason for the court not to sanction the meeting
- G or to extend the restraining order as requested by the applicant in the present case.

- H [33] The operative words in s. 176(3) of the Act, is "... three fourths in value of the creditors or class of creditors". In this case GEA and MBB (both the opposing creditors) are the only creditors who have indicated opposition to the scheme. Combined, they make only 14.53% of the value of the creditors. The remaining 85.47% of the value of the creditors have yet to decide. Their contention that there would be no possibility of the
- I statutory required percentage being obtained favouring the scheme is therefore baseless. Even if the subsidiaries ie, Maju Steel Sdn.

Bhd. and Maju Alat Ganti Sdn. Bhd. are excluded from voting GEA and MBB (the opposing creditors) merely have a combined percentage of 23.54% opposing the scheme. The balance (76.46%) if they vote in favour would satisfy the statutory requirement.

Conclusion

[34] The applicant company in its present application for an extension of the restraining order had met afresh all the requirements found in s. 176(10A) of the Companies Act 1965. The court is satisfied that there are 'good reasons' to allow such an extension as applied. The opposing creditors' opposition has failed to cast any doubt to the said 'good reasons'. Therefore the court overrules the opposition and allows the applicant application for an extension of the restraining order for the period of ninety (90) days from 25 April 2007 with costs.

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